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No. 09-70

Supreme Court, U.S.
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In The

# Supreme Court of the United States

MODERN, INC., et al.,

*Petitioners,*

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF IN RESPONSE TO BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## REASONS FOR GRANTING PETITION

Several salient facts are apparently undisputed, which, taken together, demonstrate the necessity for this Court's review. From the Brief for the Federal Respondent (Response Brief), the U.S. Fish and Wildlife Service (USFWS), it is undisputed that Petitioner had (at one time, at least) a common law flowage easement so that Modern's property would not flood. Response Brief 10 ("The United States does not dispute that, under Florida law, petitioner holds a common law flowage easement."). There also appears to be no dispute that USFWS was responsible for filling in drainage ditches, changing topography, and altering existing culverts on its Refuge adjoining Modern's property, drainage features that connected directly into the drainage system that had been in place on Modern's property and the Refuge for decades so that Modern's property is now subject to flooding when it was not before. Response Brief 3. In Count 4 of its Fourth Amended Complaint, Modern sought, pursuant to 28 U.S.C. § 2409a (the Quiet Title Act), an adjudication of "the existence, location, scope and extent of [its] drainage easements in the Drainage System" across this Refuge. Pet. App. 225. USFWS concedes that both the district court and the circuit court of appeals below *never described what Modern's flowage easement was*; according to USFWS, such an oversight simply "does not warrant this Court's review." Response Brief 8.

What remains, then, for this Court's consideration is whether the failure of two federal courts to

apply a federal statute to declare the scope of a constitutionally protected property right whose exercise is necessary to abate flooding of Modern's property warrants this Court's intervention. Petitioner respectfully submits it must.

There can be no argument that the Quiet Title Act applies to determine the scope of easements across the United States' property, such as the Refuge. 28 U.S.C. § 2409a(a); *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994); *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978) ("The quieting of title where the plaintiff claims an estate less than a fee simple, an easement, or the title to minerals is likewise included in the terms of the proposed statute," *quoting* H.R.Rep.No. 92-1559, 92d Cong., 2d Sess. reprinted in (1972) U.S.Code Cong. & Admin.News 4552). Indeed, as the district court below held,[1] the Quiet Title Act is the exclusive means by which a litigant may challenge the United States' title to real property. *Block v. North Dakota, ex rel. Bd. of University and School Lands*, 461 U.S. 273, 285-286 (1983). And the district court alone had exclusive jurisdiction to render an adjudication concerning Petitioner's easement rights across the Refuge. *See* 28 U.S.C. § 1449(f).

Petitioner was thus left with one, and only one, venue to ever obtain an adjudication of its flowage

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[1] *See Modern, Inc. v. Fla. Dept. of Transp., et al.*, 381 F.Supp.2d 1331, 1350-1351 (M.D. Fla. 2004).

easement rights in USFWS's Refuge: the district court that accepted the removal of Modern's state court action and refused to remand any part of that action back to the state court. Having accepted jurisdiction of this federal claim, the district court was required to actually quiet the title dispute it had accepted: that is, to identify Modern's flowage easement's scope, where that easement lies, and what Modern could permissibly do with this easement. *See AT&T Wireless Services of Florida, Inc. v. WCI Communities, Inc.*, 932 So. 2d 251, 256 (Fla. 4th DCA 2005) ("The scope of an easement is defined by what is granted, not by what is excluded . . . ") (internal quotations omitted). This was, after all, the issue that Petitioner presented (and tried before the district court) in Count IV of its Fourth Amended Complaint against USFWS.

The district court, however, between its summary judgment order and final judgment, effectively ignored this issue entirely. While recognizing, as it had to, that Modern held something called a common law flowage easement across USFWS's Refuge, the court never answered the fundamental questions: where is that easement located, what is its extent, and what are its limits? Instead, the district court declared that Modern had a flowage easement, but then provided nothing more than the *non sequitur* observation that USFWS and its co-defendants had not "interfered with the natural flow of waters from the Property." Pet. App. 81. Respondent seizes upon this incongruence as well in its Response Brief, when

it contends that, having conceded that Modern holds a flowage easement, the only remaining question was whether it had interfered with that easement. Response Brief 10. Petitioner's constitutionally protected property rights should not have received such short shrift.

It is a fundamental precept of the establishment of the federal judiciary that, when a claim is properly before a federal court, that court has a constitutional duty to actually resolve that claim, the failure of which amounts to a "virtual treason to the Constitution," as this Court has stated:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). "[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot County v. Sherwood,* 148 U.S. 529, 534, 13 S.Ct. 695, 697, 37 L.Ed. 546 (1893) (citations omitted). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of

> a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909) (citations omitted). Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 83, 67 L.Ed. 226 (1922).

*New Orleans Pub. Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989).

Congress conferred jurisdiction upon the district court to quiet title to the location, scope, extent, and use of Petitioner's flowage easement under the Quiet Title Act. The district court was duty-bound to describe what Petitioner's easement was – that is, to quiet the title dispute before it.

Nor was it sufficient to simply conflate the discrete issues of whether USFWS had *interfered* with Modern's easement rights with the district court's duty to ascertain *what title and rights Modern had* under its easement. To "quiet title" means to positively declare what rights and title a plaintiff has in real property. *See U.S. v. Gilbert*, 244 F.3d 888, 917 n. 72 (11th Cir. 2003) (*quoting* BLACK'S LAW DICTIONARY p. 1249 (6th ed.1990). To then conclude, as the district and circuit court of appeals had, that absent some proven interference, no Quiet Title Act claim exists is

an unheralded departure from both the letter and the spirit of the Quiet Title Act. *Cf. Progressive Consumers Federal Credit Union v. U.S.*, 79 F.3d 1228, 1233 (1st Cir. 1996) (construing 28 U.S.C. § 2410, "[While] [t]raditionally, actions to quiet title have sought determinations of who owns particular property . . . [u]nder federal law, the definition is somewhat broader . . . ") (internal citations omitted); *Cadorette v. U.S.*, 988 F.2d 215, 223 (1st Cir. 1993) ("In an action under the Quiet Title Act, by contrast, a private plaintiff names the United States 'as a party defendant . . . to adjudicate a disputed title to real property in which the United States claims an interest . . . If the plaintiff prevails, he can recover the land wrongly held by the United States. The Quiet Title Act also permits the Government to retain property it does not own, but only *after* a court has reached a 'final determination' in the title dispute 'adverse to the United States.'' ") (internal citations omitted). The district and circuit courts never reached a final determination, but instead essentially "quieted title" by implying what Petitioner's easement was *not* under one set of circumstances;[2] but the courts never stated what or where the easement was. That is a far cry from what the Act requires. It is certainly insufficient given the historic deference to private

[2] At best, the courts' holdings regarding this claim amounted to a finding that, whatever Petitioner's recognized flowage easement was, it was apparently not interfered with.

property rights that federal courts must afford under the constitution.

The failure of the district court and the Eleventh Circuit Court of Appeals to render any determination of the extent of Petitioner's easement rights not only violated a clear mandate of law, it effectively permits a taking of Modern's property in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Thus, the need for this Court's involvement becomes all the more clear: Petitioner's due process right to receive an adjudication from the federal district court is paramount in this case because its constitutionally protected property rights are threatened. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 126 (1994) (*dissent*) ("When a constitutional issue is fairly joined, necessary to the decision, and important enough to warrant review, this Court should not avoid resolving it . . . ").

It remains only to note that the district court's acquisition of jurisdiction over Modern's state law declaratory action regarding its flowage easement, confining that claim within the ambit of the Quiet Title Act, and then passing no judgment whatsoever on what or where that easement is, amounts to just as much a "judicial taking" as this Court is presently considering in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, cert. granted*, No. 08-1151 (June 15, 2009). An upland owner's common law flowage easement, recognized in name only but eviscerated of dimensions, scope, or rights, is equally as unconstitutional (and troubling)

as a court's redrawing the high water line for landowners' riparian rights. Petitioner respectfully submits that the case *sub judice* would be directly impacted by the guidance this Court may provide in *Stop the Beach Renourishment*. In all respects, this Court's review is both amply justified and necessary.

## CONCLUSION

In effect, the Respondent, the district court, and the circuit court in its affirmance, have continued to raise, in new iterations, the still unanswered question that Petitioner had put to the district court in the first place: what could Modern do with its common law flowage easement? Such a basic declaration would certainly have been well within the scope of the Quiet Title Act, the powers of the district court, or the scope of review for the circuit court of appeals. And yet, the questions remain, to this day, unanswered and undeclared. Without this Court's intervention, the "exclusive means" of the Quiet Title Act, through which Modern could obtain an adjudication of the scope of its property rights against the United States – whatever that adjudication might end up being – will be left undeclared, unresolved, and, most critical for purposes of the constitution, unenforceable.

For all of these reasons and the reasons set forth in Modern's Petition, the Court should accept jurisdiction of this case and grant the Petition.

Respectfully submitted,

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